Supreme Court, U.S.
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No.

In The

Supreme Court of the United States

October Term, 1995

THOMAS S. WALDRON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Is the failure to instruct the jury on the "materiality" element of a crime charged under 18 U.S.C. § 1014 reversible constitutional error under *United States v. Gaudin*, 515 U.S. ___, 63 U.S.L.W. 4611 (1995)?

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OPINION BELOW

The opinion and judgment of the Fifth Circuit Court of Appeals, entered on May 18, 1995, is reported at 53 F.3d 680 (5th Cir. 1995). The opinion is reprinted in the Appendix at 1a-7a.

STATEMENT OF JURISDICTION

The judgment and opinion of the Fifth Circuit, affirming a judgment of conviction and sentence of the United States District Court for the Middle District of Louisiana, was entered on May 18, 1995. App. 7a. No rehearing was sought. This petition for certiorari is being filed within 90 days of the May 18, 1995 opinion and judgment. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1).

CONSTITUTIONAL PROVISIONS AND STATUTE INVOLVED

Constitutional Provisions

The Fifth Amendment to the United States Constitution provides:

> No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb, nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without

> due process of law; nor shall private property be taken for public use, without just compensation.

The Sixth Amendment to the United States Constitution provides:

> In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining Witnesses in his favor, and to have the Assistance of Counsel for his defence.

Statutory Provision

Title 18 U.S.C. § 1014 provides:

> Whoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of the Reconstruction Finance Corporation, Farm Credit Administration, Federal Crop Insurance Corporation or a company the corporation reinsures, Farmers' Home Corporation, the Secretary of Agriculture acting through the Farmers Home Administration, the Rural Development

Administration, any Farm Credit Bank, production credit association, agricultural credit association, bank for cooperatives, or any division, officer, or employee thereof, or of any regional agricultural credit corporation established pursuant to law, or of the National Agricultural Credit Corporation, a Federal land bank, a Federal land bank association, a Federal Reserve bank, a small business investment company, a Federal credit union, an insured State-chartered credit union, any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, the Office of Thrift Supervision, any Federal home loan bank, the Federal Housing Finance Board, the Federal Deposit Insurance Corporation, the Resolution Trust Corporation, the Farm Credit System Insurance Corporation, or the National Credit Union Administration Board, a branch or agency of a foreign bank (as such terms are defined in paragraphs (1) and (3) of section 1(b) of the International Banking Act of 1978), or an organization operating under section 25 or section 25(a) of the Federal Reserve Act, upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same, by renewal, deferment of action or otherwise, or the acceptance, release, or substitution of security therefor, shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both.

STATEMENT OF THE CASE AND THE FACTS

A. The Procedural History, Charges, Conviction and Sentence

Petitioner Thomas S. Waldron is a Florida real estate developer who was charged with Title 18 U.S.C. § 1344 bank fraud, aiding and abetting a false entry into bank records (18 U.S.C. § 1006) and eight counts of making false statements to a federally insured Louisiana bank under Title 18 U.S.C. § 1014.

At his October, 1993 trial in Baton Rouge, Louisiana, Waldron was acquitted on all but six § 1014 false statement counts. The false statements arose from identical non-disclosures on three loan applications and three related borrower's affidavits. Those documents contained representations that no litigation or governmental proceedings adversely affected the property for which loans were sought, and that the land was "not subject to any lien, security interest or other encumbrance except the first mortgage on Parcel A described in the mortgage title binder." App. 3a n. 3.

The criminal prosecution was based on the existence of a contract for sale and purchase, two deeds, and certain environmental proceedings which were extant at the time of the signing of the loan documents. One of Waldron's defenses was that the contract and deeds were contingent upon a never-executed Land Trust Agreement, therefore they were not liens, security interests or other encumbrances, and not material. The environmental litigation was settled for $5,000 and Waldron contended it was not material and that the non-disclosure was caused by his lawyer. His lawyer testified:

> I blame myself for this .... [H]ere I'm closing a loan, with the loan agreement

> dealing specifically with pending litigation and it doesn't get in the loan agreement. It's very embarrassing.

(R11-218).

Waldron's conviction on the false statement counts resulted in "two consecutive 18-month terms of imprisonment on two counts, [a fine of] $2,000,000.00, and . . . five years probation following his release." 53 F.3d at 682; App. 4a. Applications for bond pending appeal were denied by the district court, and by the court of appeals. Waldron is incarcerated in federal prison camp in Atlanta. He is eligible for halfway house release on November 21, 1995 and is scheduled for release March 25, 1996. An application for release pending certiorari review has been filed contemporaneously with this Petition.

B. The Trial Court's Instructions to the Jury on "Materiality"

The trial court instructed Waldron's jury on the elements of § 1014:

> Now, this section, section 1014, makes it a crime for anyone knowingly to make a false statement to a federally insured bank or savings and loan or other financial institution for the purpose of influencing the bank on an application for a loan.
>
> For you to find the defendant guilty of the crime alleged in counts 3 through 10, you must be convinced that the government has proved beyond a reasonable doubt, each of the following:

> First, that the defendant made or caused to be made a false statement to Sun Belt;
>
> Second, that the defendant made the statement knowingly;
>
> Third, that the Defendant did so for the purpose of influencing the bank on an application for a loan; and
>
> Fourth, *that the statement was false as to what we call a material fact.*

R13-261-262 (emphasis supplied).

Those instructions comported with the governing Fifth Circuit law:

> To sustain a conviction under this statute, *the government must prove that:* (1) the defendant made a false statement to a financial institution; (2) the defendant knew the statement was false when he made it; (3) he made it for the purpose of influencing the financial institution's action; and (4) *the statement was false as to a material fact.*

United States v. Williams, 12 F.3d 452, 456 (5th Cir. 1994) (footnote omitted) (emphasis supplied). *Williams* reiterated the then-accepted (*i.e.*, pre-*Gaudin*) notion that "[m]ateriality is a legal determination made by the district court," and that "[a] false statement is material if it is shown to be capable of influencing a decision of the institution to which it was made." *Id.* at 456 (footnote omitted).

The trial court told the jury that it should not consider the fourth element of the crime — "materiality":

> Now this question of material statement *is not* a question for you to decide. This is a question of law for the Court to decide. *I have decided that question,* and you are hereby instructed that the *statements alleged to be false* in counts 3 through 10 *are all material statements.*
>
> Now, while I have found under the law that each of the statements was material, that is capable of influencing Sun Belt in acting on the loan, you must decide whether the defendant knowingly caused false statements to be made for the purpose of influencing the bank on an application for a loan.

R13-263-264 (emphasis supplied).[1]

C. "Materiality" on Appeal

On appeal, Waldron explicitly and repeatedly raised the "materiality is for the jury" issue as it had been expressed in the Ninth Circuit's decision in *United States v. Gaudin,* 28 F.3d 943 (9th Cir. 1994) (*en banc*). One issue presented in the "Statement of the Issues" in Waldron's Fifth Circuit Brief was:

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1. Waldron's trial counsel objected to the jury being told the statements were material: "It being a matter for the court, under Fifth Circuit law, we think it, the jury, should not properly be instructed as to the matter at all." (R13-272, 273). Given the controlling law in the circuit, a *Gaudin*-like objection would have been futile.

DOES *IN RE WINSHIP*, 397 U.S. 358 (1970), AS APPLIED IN *UNITED STATES V. GAUDIN*, ___ F.3d ___ (9TH CIR. 1994) REQUIRE THAT "MATERIALITY" OF A FALSE STATEMENT BE DECIDED BY A JURY, NOT THE COURT?

See App. 9a (excerpts of Waldron's Initial Brief in the Fifth Circuit).

The Brief's "Statement Regarding Oral Argument" cited several reasons for argument, including "the constitutionality under *In re Winship* [397 U.S. 358 (1970)] of a court, not a jury, determining 'materiality,' an essential element of a false statement case." App. 9a. Waldron's Brief presented the *Gaudin* materiality issue under the heading "A Challenge to Established Dogma — Materiality Was for the Jury, Not the Court." App. 12a. Waldron's Brief asserted "*in toto* the [Ninth Circuit] *Gaudin* majority holding" (App. 13a), acknowledging Judge Kozinski's "tsunami" dissent in that court (28 F.3d 953) and concluding, "should *Gaudin's* 'tsunami' survive [in the Supreme Court] or persuade [the Fifth Circuit], Waldron's conviction must be reversed." App. 13a. Waldron's Reply Brief noted the continuing viability of the *Gaudin* issue and the fact that the Government had sought certiorari review in *Gaudin*. App. 14a-15a.

Waldron's appeal was argued in the Fifth Circuit on January 5, 1995, the day before this Court granted certiorari in *Gaudin*. 115 S. Ct. 713 (1995). Undersigned counsel reminded the Fifth Circuit panel of the pendency of the *Gaudin* certiorari petition, and after certiorari was granted, brought that fact to the Fifth Circuit's attention.

After *Gaudin* was argued, Waldron filed as supplemental authority portions of the Government's Supreme Court Brief on

the Merits in *Gaudin*, and a transcript of the April 17, 1995 oral argument.[2]

On May 18, 1995, the Fifth Circuit affirmed Waldron's conviction. App. 1a-7a. Among other legal conclusions, the court wrote: "Even assuming the 1982 Contract for Sale and Purchase of two warranty deeds were contingent upon the unexecuted and Trust Agreement, we find that their existence *was material* to whether Sun Belt would risk extending the three $1,000,000.00 loans." 53 F.3d at 683; App. 5a (emphasis supplied). The decision never mentioned the "materiality is for the jury" issue, or *Gaudin*. It said only:

> Our review of Waldron's remaining issues on appeal reveals no reversible error on the part of the district court. Therefore, we find that Waldron's remaining claims have no merit.

53 F.3d at 684; App. 7a.

Thirty-two days later this Court decided *Gaudin*, and held unanimously that in a Title 18 U.S.C. § 1001 case (false statement to a department or agency of the United States) the Fifth and Sixth Amendments to the Constitution require the element of materiality to be determined by a jury, not a court. 515 U.S. ___; 63 U.S.L.W. at 4615.

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2. In *Gaudin*, the Government sought to distinguish 18 U.S.C. § 1001 from other false statement statutes, arguing that "materiality" was properly a question of law in § 1001 (where the operations of the government agency were a matter of law), but that in other statutes involving false statements to a private entity materiality was a matter of fact. *See* Petitioner's Reply Brief in *United States v. Gaudin*, No. 94-514, pp. 5-8. *See also* App. 17a-18a n. 1. Although this Court's decision in *Gaudin* did not rest on that distinction, the Government's logic adds force to the argument in favor of granting certiorari in this case, which involves alleged false statements to a private, federally insured, bank.

Petitioner Thomas Waldron seeks certiorari to review the decision below which concluded that there was "no merit" to his claim that under § 1014 the element of materiality was for the jury, not the judge. That conclusion presents two reasons for granting certiorari.

REASONS FOR GRANTING THE WRIT

I.

THE PETITION PRESENTS AN IMPORTANT BUT UNANSWERED QUESTION OF FEDERAL CRIMINAL AND CONSTITUTIONAL LAW

This case presents an important but answered question: Does a defendant charged with a violation of Title 18 U.S.C. § 1014 (making a material false statement to a federally insured bank) have a constitutional right to have a jury determine, beyond a reasonable doubt, his guilt on the element of materiality? "Materiality" is an essential element of the offense created by § 1014. *United States v. Williams,* 12 F.3d 452, 456 (5th Cir. 1994).

United States v. Gaudin, 515 U.S.__, 63 U.S.L.W. 4611 (June 19, 1995) held that in a prosecution brought pursuant to 18 U.S.C. § 1001 (making a material false statement to a department or agency of the government), a "trial judge's refusal to allow the jury to pass on the 'materiality' of Gaudin's false statements infringed" the defendant's right to have "a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Id.* at 4615. On its face, *Gaudin* addresses only § 1001, but the rationale is applicable to § 1014, which contains an identical "materiality" element.

Section 1014 requires, like § 1001, "that the statements be 'material' to the . . . inquiry, and that 'materiality' is an element

of the offense that the government must prove," and that "the definition of 'materiality' [is that] the statement must have a 'natural tendency to influence or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, 515 U.S. __, 63 U.S.L.W. at 4612 (citation omitted); *see also United States v. Williams*, 12 F.3d 452, 456 (5th Cir. 1994) (§ 1014). Therefore the answer in a § 1014 case should be the same as the answer provided by *Gaudin:* the Constitution requires that a jury decide materiality.

This case provides the opportunity to answer the important question of whether *Gaudin* requires that a § 1014 defendant be accorded the same right as Gaudin, to have the jury determine materiality — an essential element of the government's proof.

II.

CONFLICT WITH *GAUDIN*

The court of appeals decision affirming Waldron's conviction did not address the "materiality" / *Gaudin* issue, although Waldron raised the Ninth Circuit's *Gaudin* opinion in his Fifth Circuit Initial Brief (App. 8a-13a). In addition, Waldron noted this Court's grant of certiorari in his Reply Brief (App. 15a) and shortly after the April 17, 1995 *Gaudin* oral argument provided the court of appeals with a transcript of the argument. *See* discussion *supra* at 8-9.

The silence of the decision below on the *Gaudin* issue does not minimize the decision's conflict with *Gaudin*. Having been squarely presented with the *Gaudin* issue, the court of appeals should have addressed it, or at the least, awaited the outcome in *Gaudin* before deciding the Waldron appeal. The decision below simply concluded that the issues raised by Waldron, which the opinion did not discuss, had "no merit." App. 7a. Waldron

properly raises the *Gaudin* issue in this Petition for Certiorari, and because his conviction has not achieved "finality" under *Griffith v. Kentucky*, 479 U.S. 314 (1987), Waldron is entitled to receive the benefit of *Gaudin*. *Id.* at 321 n.6.

The decision below conflicts with *Gaudin* because this Court's analysis of the constitutional error in failing to instruct the jury on an essential element of the crime under § 1001 is equally applicable to § 1014. Certiorari should be granted and plenary review accorded Waldron's claim that *Gaudin* applies to a § 1014 case. At the least, because the court of appeals did not have the benefit of this Court's *Gaudin* decision when its opinion was written, certiorari should be granted and the decision below vacated with a remand to the court below to determine whether materiality should have been decided by the jury in this § 1014 case, and whether Waldron's convictions should be reversed. *See Porat v. United States*, 63 U.S.L.W. 3905 (1995) (vacating a Third Circuit decision holding that "materiality" could be determined as a matter of law in a prosecution under 18 U.S.C. § 1623 — false statement to a grand jury — granting certiorari, and remanding for consideration in light of *Gaudin*).

CONCLUSION

For the foregoing reasons certiorari should be granted and this case should be accepted for plenary review. In the alternative, certiorari should be granted and the decision below vacated and remanded for consideration in light of this Court's decision in *Gaudin*.

Respectfully submitted,

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APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS, FIFTH CIRCUIT MAY 18, 1995

United States Court of Appeals,
Fifth Circuit.

No. 94-30083.

May 18, 1995.

UNITED STATES of America,

Plaintiff-Appellee,

v.

Thomas S. WALDRON,

Defendant-Appellant.

Before REAVLEY, DUHE and PARKER, Circuit Judges.

ROBERT M. PARKER, Circuit Judge:

Thomas S. Waldron ("Waldron") appeals his conviction and sentence on six counts of making a false statement on loan documents to a bank in violation of 18 U.S.C. § 1014. We affirm.

FACTS AND PROCEDURAL HISTORY

In 1981, Waldron, a real estate developer in Florida, purchased property near West Palm Beach for $1,850,000.00 through his corporation Marpalm Ranch and Farm, Inc. ("Marpalm"). When Waldron began experiencing financial

problems, he asked two business associates, Larry Reger ("Reger") and Harry Williams ("Williams"), if they wanted to buy into the venture and assume the mortgage payments on the property.

On March 9, 1982, Waldron signed a Contract for Sale and Purchase, which was an agreement between Richard Harris ("Harris"), Reger and Williams's attorney acting as trustee, and Marpalm to sell the property. The contract contained an arrangement for a closing in escrow. On that same day, Waldron also executed a warranty deed to the trustee and a warranty deed with the grantee left blank. The contract gave the purchaser sole discretion to decide which of the two warranty deeds would be recorded. The contract also disclosed four pending disputes over environmental issues affecting the property.[1]

At closing, Waldron's documents were delivered to Harris's law firm, as escrow agent, to remain in escrow until April 1, 1992. Waldron received nearly $132,000.00 to compensate Marpalm for interest it had paid on the note. Sometime after the closing in 1982, Harris prepared an unsigned Land Trust Agreement, which was referred to in the warranty deed to the trustee.

In 1985, Waldron was introduced to Wendell Shelton ("Shelton"), the Chairman of the Board of Sun Belt Federal Bank ("Sun Belt"), a federally insured savings bank. Originally,

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1. Those issues were as follows: (1) a claim asserted by South Florida Water Management District; (2) a claim from the Florida Department of Environmental Regulation; (3) a claim from the United States Department of the Army; and (4) matters set forth in a final order issued by the Assistant Secretary of the State of Florida Department of Environmental Regulation.

Shelton proposed a $3,000,000.00 loan to Waldron based upon a mortgage of the Marpalm property. Shelton falsified Board minutes to obtain a commitment letter without the approval of the Board of Directors.[2] However, the loan negotiations broke down at closing because the structure of the loan violated usury laws. Shelton and Waldron then agreed that Sun Belt would make three separate $1,000,000.00 loans to three corporations created by Waldron. Waldron installed three nominees in the three newly formed corporations to sign the applicable Sun Belt loan documents. Neither the nominees nor Sun Belt was told of the existence of the 1982 Contract for Sale and Purchase, the two warranty deeds, or the pending environmental proceedings.

On three successive Fridays in May 1985, each nominee signed a loan agreement and two affidavits.[3] When Harris found out about the Sun Belt loans involving the Marpalm property, he notified Clarence Rautenstrauch ("Rautenstrauch"), a representative employee of Reger. Rautenstrauch instructed Harris to record the deed.

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2. In a separate proceeding, Shelton pleaded guilty to charges arising out of that conduct. Waldron was charged as an accomplice, but was acquitted.

3. Each loan agreement contained representations that:

No litigation or governmental proceeding is pending or threatened against or affecting Borrower or the Land which may result in any material adverse change in Borrower's business, operations or the title to the Land or prevent or alter the use of the Land for any purposes;

(and)

The Land is not subject to any lien, security interest or other encumbrance except the first mortgage on Parcel A described in the mortgage title binder.

Appendix A

On June 27, 1985, Harris sent a letter to Waldron informing Waldron of his clients' concern over the Sun Belt loans. Then on July 1, 1985, Harris notified Sun Belt by letter of his clients' intentions to record their 1982 warranty deed. On July 10, 1985, Harris filed the warranty deed to the trustee. Based upon Harris's actions in filing the deed, Sun Belt stopped funding the loans.

Waldron was indicted by a grand jury on February 4, 1993. The indictment charged one count of bank fraud and aiding and abetting, one count of aiding and abetting false entry into bank records, and eight counts of false statements and aiding and abetting. At the conclusion of a jury trial in October 1993, Waldron was acquitted on bank fraud, false entry, and two counts of making false statements. He was convicted on the remaining six counts of making false statements. The district court denied a post-trial motion for judgment of acquittal and a new trial on February 2, 1994. On that same date, Waldron was sentenced to two consecutive 18-month terms of imprisonment on two counts, fined $2,000,000.00, and placed on five years probation following his release. His sentence was suspended on the remaining counts.

ANALYSIS

Disclosure of a Valid Claim or Interest

Waldron contends that his statements on the Sun Belt loan documents were true because under Florida law, neither Harris nor his clients had any valid claims or interests, recorded or unrecorded, in the Marpalm property. He argues that the language of the unsigned Land Trust Agreement left no doubt that the conveyance of the property was tied to execution of that agreement. Therefore, the 1982 Contract for Sale and Purchase

and the two warranty deeds, in absence of the execution of the Land Trust Agreement, did not constitute a claim, encumbrance, or adverse interest.[4]

We will reverse the district court's denial of a motion for judgment of acquittal only if no rational finder of fact could have found sufficient evidence, whether direct or circumstantial, to support a conviction, with all reasonable inferences drawn in the light most favorable to the verdict. *United States v. Faulkner*, 17 F.3d 745, 768 (5th Cir.), __ U.S. __, 115 S.Ct. 193, 130 L.Ed.2d 125 (1994).[5]

Even assuming the 1982 Contract for Sale and Purchase and two warranty deeds were contingent upon the unexecuted Land Trust Agreement, we find that their existence was material to whether Sun Belt would risk extending the three $1,000,000.00 loans. The 1982 Contract for Sale and Purchase specifically states that conveyance of title shall be by "recordable Warranty

4. Waldron's argument that a literally true answer is not a criminally false statement relies heavily on *United States v. Chapman*, 7 F.3d 66 (5th Cir. 1993), cert. denied, __ U.S. __, 114 S. Ct. 2713, 129 L. Ed. 2d 839 (1994). In *Chapman*, the defendant appealed a conviction of making false statements in connection with the acquisition of firearms. While he was appealing another criminal conviction, the defendant purchased a pistol, answering that he was not a "convicted felon" on the ATF forms. This Court reversed in part on the ground that under Texas law, the defendant was not a "convicted felon" during the pendency of his appeal. The Court concluded, therefore, that the defendant's statement was actually true. We find, however, that *Chapman* does not control in this case because the existence of the 1982 contract and two warranty deeds had an effect on the Sun Belt loans.

5. To sustain a conviction under 18 U.S.C. § 1014, the Government must prove that defendant knowingly and willfully made a false statement to a financial institution for the purpose of influencing the financial institution's action. *See United States v. Bowman*, 783 F.2d 1192, 1197-98 (5th Cir. 1986).

Deed" and that "[p]ossession of the premises shall be delivered on April 1, 1982." It also states that at closing in escrow, "seller shall execute any and all . . . documents reasonably required to be executed in connection with the transfer of title to the property." The contract makes no mention of the Land Trust Agreement, which was never executed, but specifically gives the purchaser the discretion of filing either warranty deed. Once Harris became aware of the Sun Belt loans and notified his clients, he was instructed to and filed the warranty deed to the trustee. Therefore, the jury could reasonably find the contract and warranty deeds constituted a claim, encumbrance, or adverse interest in the Marpalm property that Waldron was required to reveal to Sun Belt.

Disclosure of Environmental Proceedings

Waldron contends that no reasonable jury could conclude that he knowingly made a false statement with regard to the ongoing environmental proceedings because the Government failed to present any evidence that Waldron knew that the loan statements prepared by his attorney, George Bailey, would omit the information.[6]

Our review of the record reveals that Waldron was present at the Sun Belt loan proceedings, giving him the opportunity to read the loan applications and discover the omitted information. In addition, in reviewing the loan documents, Waldron would have read the representation, which was in all three loan agreements, that "no litigation or governmental proceeding [was] pending." Therefore, we find a reasonable jury could have inferred that he had knowledge that the ongoing environmental proceedings were

6. Waldron did disclose the environmental litigation to Harris and his clients in the 1982 Contract for Sale and Purchase.

omitted from the loan documents and failed to disclose that omission to Sun Belt.

Opinion Testimony and Exclusion of Documentary Evidence

Waldron contends that the district court erroneously allowed Harris to testify as to his legal opinion on the ultimate fact in this case (whether, in light of the contract and deeds, Waldron's answers were false), and that the court did not cure the error by instruction because the judge failed to tell the jury to disregard Harris's testimony. Waldron also argues that the court abused its discretion when it admitted an unsigned, undated copy of the Land Trust Agreement that was central to his defense and then eliminated it the very next day.

Our review of the record reveals that Harris did not testify as to the ultimate issue of whether Waldron knowingly made false statements. Even if his testimony was erroneously admitted, the district judge cured the error by instructing the jury that Harris was not the judge of the law; the judge was. As for the court's admittance and subsequent exclusion of the unexecuted Land Trust Agreement, again, we find no abuse of discretion in light of the court's explanation and instruction given to the jury for his decision to exclude the evidence at a later time.

Our review of Waldron's remaining issues on appeal reveals no reversible error on the part of the district court. Therefore, we find that Waldron's remaining claims have no merit.

CONCLUSION

For the reasons articulated above, Waldron's conviction and sentence are AFFIRMED.

APPENDIX B — EXCERPTS FROM WALDRON'S INITIAL BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 94-30083

District Court Docket No. 93-14A

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS S. WALDRON,

Appellant.

On Appeal from the United States District Court for the Middle District of Louisiana

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Appendix B

* * * *

STATEMENT REGARDING ORAL ARGUMENT

The substantial issues in this case involve the nuances of Florida real estate trust law; evidentiary rulings which permitted admittedly improper government testimony to be heard by the jury, and which excluded critical defense evidence; a *Mesarosh v. United States* issue caused by a false document unwittingly introduced by the government; the sufficiency of the evidence for an 18 U.S.C. § 1014 conviction (false statements to a bank); and the constitutionality under *In re Winship* of a court, not a jury, determining "materiality," an essential element of a false statement case. Oral argument will assist the Court's resolution of the issues presented.

* * * *

STATEMENT OF THE ISSUES (continued)

* * * *

VI.

DOES *IN RE WINSHIP*, 397 U.S. 358 (1970), AS APPLIED IN *UNITED STATES V. GAUDIN*, ___ F.3d ___ (9TH CIR. 1994) REQUIRE THAT 'MATERIALITY' OF A FALSE STATEMENT BE DECIDED BY A JURY, NOT THE COURT?

* * * *

Appendix B

[Initial Brief pp. 42-46:]

* * * *

B. THE CONSTITUTIONAL ERROR; THE ELEMENTS AND THE INSTRUCTION

The elements of an 18 U.S.C. § 1014 case are easily stated:

> To sustain a conviction under this statute, the government must prove that: (1) the defendant made a false statement to a financial institution; (2) the defendant knew the statement was false when he made it; (3) he made it for the purpose of influencing the financial institution's action; and (4) the statement was false as to a material fact.

United States v. Williams, 12 F.3d 452, 456 (5th Cir. 1994) (footnote omitted).

Judge Parker's instructions paralleled the elements:

> Now, this section, section 1014, makes it a crime for anyone knowingly to make a false statement to a federally insured bank or savings and loan or other financial institution for the purpose of influencing the bank on an application for a loan.
>
> For you to find the defendant guilty of the crime alleged in counts 3 through 10, you must be convinced that the government has proved beyond a reasonable doubt, each of the following:

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> First, that the defendant made or caused to be made a false statement to Sun Belt;
>
> Second, that the defendant made the statement knowingly;
>
> Third, that the Defendant did so for the purpose of influencing the bank on an application for a loan; and
>
> Fourth, that the statement was false as to what we call a material fact.

(R13-261-262).

Williams reiterates the accepted notion that "[m]ateriality is a legal determination made by the district court," and that "[a] false statement is material if it is shown to be capable of influencing a decision of the institution to which it was made." *Id.* at 456 (footnote omitted). Judge Parker's instruction echoed that principle:

> Now this question of material statement *is not* a question for you to decide. This is a question of law for the Court to decide. *I have decided that question,* and you are hereby instructed that the *statements alleged to be false* in counts 3 through 10 *are all material statements.*
>
> Now, while I have found under the law that each of the statements was material, that is capable of influencing Sun Belt in acting on

> the loan, you must decide whether the defendant knowingly caused false statements to be made for the purpose of influencing the bank on an application for a loan.

R13-263-264 (emphasis supplied).

C. A CHALLENGE TO ESTABLISHED DOGMA — MATERIALITY WAS FOR THE JURY, NOT THE COURT

An *en banc* majority of the Ninth Circuit has recently raised a constitutional flag on the materiality matter of law mantra:

> [W]hen the judge rules that a false statement is material, and withdraws the element of materiality from the jury, the judge deprives the jury of its fact-finding duty and violates the defendant's Due Process and Sixth Amendment rights.

United States v. Gaudin, __ F.3d __, 1994 WL 271930, *8 (9th Cir. June 21, 1994). Relying on the *In re Winship*, 397 U.S. 358, 365 (1970) promise that the "Due Process clause protects the accused against conviction except upon proof [to a proper fact finder] beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged" (*Gaudin* at *9), the Ninth Circuit acknowledged that it had broken new ground and old shackles in 18 U.S.C. § 1001 cases (the charge in *Gaudin*) and in all other crimes carrying a materiality element. *Id.* at *6.[11]

---

11. Judge Posner presaged *Gaudin* in *United States v. Staniforth*, 971 F.2d 1355 (7th Cir. 1992) where, in a § 1014 case, he wrote:

(Cont'd)

Appendix B

Appellant Waldron asserts *in toto* the *Gaudin* majority holding, including its "plain error" and harmful error analysis. *Id.* at *8-*10.[12] We recognize the change in law *Gaudin* portends, and the possibility that the *Gaudin* dissent may prevail in the Supreme Court: "What more can one possibly say except that the maverick spirit is alive and well here in the West?" *Id.* at *11 (Kozinski, J., dissenting). But our law, unlike the law of the Medes and the Persians, is mutable. (Cf. *Hurtado v. California,* 110 U.S. 516, 528-529, 4 S.Ct. 111, 117-118 (1884)). *Gaudin's* and Judge Posner's view is correct. Should *Gaudin's* "tsunami" (*id.* at *10) survive or persuade this Court, Waldron's conviction must be reversed.

* * * *

(Cont'd)

> The cases also hold that materiality is a question of law, and hence to be decided by the judge. . . . This is more than a little puzzling. A criminal defendant is entitled to require the prosecutor to prove to the jury's satisfaction every element of the offense. . . . But the question of whether a false statement to a bank or other business firm is capable of influencing the firm's decisions is no more a question of law than whether a false statement to a prospective investor is capable of influencing his decision to invest and therefore is material to that decision.

971 F.2d at 1357-58. Ultimately the court decided it "need not attempt to resolve today the interesting issue of whether materiality in a prosecution under section 1014 is a question of fact or a question of law." *Id.* at 1358.

12. Waldron's counsel did not precisely raise this issue at trial. He assumed materiality was for the court but objected to the prejudice of telling the jury the consequences of materiality, i.e., that the bank would be influenced. (R13-273).

APPENDIX C — EXCERPTS FROM WALDRON'S REPLY BRIEF IN THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT

Case No. 94-30083

District Court Docket No. 93-14A

UNITED STATES OF AMERICA,

Appellee,

vs.

THOMAS S. WALDRON,

Appellant.

On Appeal from the United States District Court for the Middle District of Louisiana

APPELLANT'S REPLY BRIEF

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Appendix C

* * * *

[Reply Brief p.14 n.3] The materiality issue — for the court or the jury — is a point of dispute because of Waldron's adoption of the recent Ninth Circuit decision, *United States v. Gaudin*, 28 F.3d 943 (9th Cir. 1994), *petition for cert. filed*, No. 94-514. The government properly cites the governing law of this Circuit on the subject. (Brief for the United States, p. 45).

* * * *

APPENDIX D — WALDRON'S NOTICE OF SUPPLEMENTAL AUTHORITY (5TH CIRCUIT)

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May 8, 1995

Clerk
United States Court of Appeals
for the Fifth Circuit
600 Camp St. Room 102
New Orleans, LA 70130

Re: United States v. Waldron, No. 94-30083
(argued and awaiting decision)
Notice of Supplemental Authority

Dear Sir or Madam,

Pursuant to Rule 28(j), Fed.R.App.P., Appellant Thomas Waldron, through undersigned counsel, submits the attached supplemental authorities for the Court's consideration:

1. Government Reply Brief in *United States v. Gaudin*, No. 94-514, pending in the Supreme Court of the United States (*see* pp. 6-9,11);

2. Transcript of Oral Argument in *Gaudin* (*see* pp. 4, 19).

Following the oral argument in this case on January 5, 1995, the government's petition for a writ of certiorari in *United States*

v. Gaudin, 28 F.3d 943 (9th Cir. 1994) (*en banc*) was granted; the case was argued before the Supreme Court of the United States (No. 94- 514) April 17, 1995. Appellant Waldron's Initial Brief raised *Gaudin* in Point IV(C), p. 44, and argued that the *en banc* decision of the Ninth Circuit Court of Appeals (holding that in an 18 U.S.C. § 1001 case it was plain error under *Winship* for the court to decide the element of "materiality" and to not submit it to the jury) is correct and requires reversal of Waldron's convictions under 18 U.S.C. § 1014. When certiorari was granted in *Gaudin*, Waldron sought bond pending appeal pending the outcome in *Gaudin*, but that motion was denied by this Court.

The government argued in *Gaudin* that because § 1001 involves a false statement to a governmental agency with statutory duties, the element of materiality should be decided by the court as a matter of law (Government Reply Brief No. 94-514), while *acknowledging* that where the false statement is made to a private agency the element of materiality is properly decided by the jury as a matter of fact. *Id.* at 6-9, 11. *See also*, Transcript of Oral Argument in *Gaudin*, pp. 4, 19.[1] That newly-articulated

---

1. The relevant colloquy at p. 4 is:

> QUESTION: But Mr. Dreeben [Assistant Solicitor General], you recognize that in the case of material misrepresentations to a private party, for example in the securities area, that those are regarded as questions for the jury, the materiality of a misrepresentation, say, in a proxy statement.
>
> MR. DREEBEN: We do concede that.
>
> QUESTION: So how — what is the distinction? Do you just say, whenever it's to a Government agency it's

(Cont'd)

government position is pertinent to Waldron's appeal, because he was convicted under 18 U.S.C. § 1014 for making a false statement to a private entity — a bank.

The accompanying supplemental materials are submitted to apprise this Court that the government's ultimate argument in *Gaudin* may be decisive in this case.

Respectfully submitted,

/s/ —
BRUCE S. ROGOW
BEVERLY A. POHL
Counsel for Appellant

CERTIFICATE OF SERVICE

I HEREBY CERTIFY that a true and correct copy of the foregoing Notice of Supplemental Authority has been furnished to IAN F. HIPWELL, AUSA, and RANDALL B. MILLER, AUSA, United States District Courthouse, 339 Florida Street, Sixth Floor, Baton Rouge, Louisiana 70801, by *U.S. Mail* this *8th* day of *May,* 1995.

/s/
BRUCE ROGOW

(Cont'd)

for the judge, and whenever it's to a nongovernmental entity it's for the jury, and what's the rhyme or reason?

MR. DREEBEN: Well, I think that the line that history has drawn is between the materiality of false statements to private parties and the materiality of the false statements to Government bodies, and we accept that line as one that has enough basis in reason to survive the question of whether it violates the Due Process Clause of the Fifth Amendment.

(2)

No. 95-167

Supreme Court, U.S.
FILED
SEP 14 1995
CLERK

In The

Supreme Court of the United States

October Term, 1995

THOMAS S. WALDRON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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23 pp

SUPPLEMENTAL BRIEF IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

AN EIGHTH CIRCUIT DECISION THAT *UNITED STATES v. GAUDIN*, 115 S.Ct. 2310 (1995), REQUIRES REVERSAL OF AN 18 U.S.C. § 1014 CONVICTION BECAUSE THE ELEMENT OF "MATERIALITY" WAS DETERMINED BY THE COURT, CONFIRMS THE CIRCUIT-WIDE IMPORTANCE OF THE QUESTION PRESENTED

Petitioner Thomas S. Waldron submits this supplemental brief, and notice of supplemental authority in support of his petition for writ of certiorari, to apprise the Court of a new decision of the Eighth Circuit Court of Appeals, *United States v. Wells*, __F.3d__, 1995 WL 494268 (8th Cir. Aug. 21, 1995). The decision is reproduced in the Appendix to this supplemental brief.

A. "Materiality" Is an Element of 18 U.S.C. § 1014

Wells decided a threshold issue for *Gaudin* purposes: whether "materiality" is an essential element of a crime charged under 18 U.S.C. § 1014, despite the fact that the word is not used in the statute. That issue was raised by the Government in this case in the bond application proceedings in the court below.[1] In *Wells*, the Eighth Circuit rejected the "materiality is not an essential element" argument, "explicitly adopt[ing] the rule we

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1. There, the Assistant United States Attorney opposing Waldron's Application for Bond Pending Certiorari Review argued that materiality is not an element of an 18 U.S.C. § 1014 offense. He also argued that *Williams v. United States*, 458 U.S. 279 (1982), a § 1014 check kiting case, established that materiality is not an element of § 1014 by its silence on materiality. We do not know what position will be taken by the Solicitor General. The Solicitor General's Office has been granted an extension of time until September 25, 1995 for responding to the petition for certiorari.

have implicitly acknowledged before, that the 'materiality' of a false statement is an element of proving a violation of § 1014." App. 11a.

Every circuit except the Second Circuit (which has not spoken) is in agreement with that conclusion: "materiality" is an essential element of the government's proof in a § 1014 prosecution.[2] Post-*Gaudin*, the issue is critical to constitutional analysis of a § 1014 conviction if, as in Waldron's case, materiality was determined by the court rather than by the jury.

If the Government argues that materiality is not an essential element in § 1014, despite the circuit court decisions, resolution of that important question will be another basis for granting certiorari in this case, and one which is fairly contained within the question presented. If materiality is an essential element of § 1014, the Fifth Circuit's affirmance of Waldron's conviction conflicts with *Gaudin*.

---

2. *See United States v. Ryan*, 828 F.2d 1010, 1014 n.1 (3rd Cir. 1987) (*citing United States v. Whaley*, 786 F.2d 1229, 1231 (4th Cir. 1986); *United States v. Stephens*, 779 F.2d 232, 237 (5th Cir. 1985)); *United States v. Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992) (*citing United States v. Ribaste*, 905 F.2d 1140, 1143 (8th Cir.1990); *United States v. Haddock*, 956 F.2d 1534, 1550-51 (10th Cir.1992)); *see also*, cases cited in *Wells*, App. 11a.

B. *Wells* Confirms That *Gaudin* Error in a § 1014 Case Requires a New Trial

The force of *Gaudin* compelled the Eighth Circuit in *Wells* to grant the relief which Waldron seeks:

> Because the statute requires proof of the materiality of a false statement, materiality is an element of § 1014. *Gaudin*, therefore, *dictates* that we vacate the defendants' convictions on both counts I and II and remand the case to the district court for retrial. The trial court's determination of materiality as a matter of law denied the defendants' constitutional right to have a jury determine each and every element of a charged crime, including the materiality of a false statement charged under § 1014 and under the § 371 charge of a conspiracy to violate § 1014.

App. 12a-13a (emphasis supplied). The court's only extended analysis was on the question of whether materiality was an element of the crime. *Id.* at 9a-12a. Once that was decided affirmatively, reversal of the conviction in *Wells* followed *a fortiori*.

United States v. Wells provides new support for Waldron's arguments for granting certiorari.

CONCLUSION

For the foregoing reasons certiorari should be granted and this case should be accepted for plenary review, or in the alternative, certiorari should be granted and the decision below vacated and remanded for consideration in light of this Court's decision in *Gaudin*.

Respectfully submitted,

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September 13, 1995

APPENDIX A — OPINION OF THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT FILED AUGUST 21, 1995

UNITED STATES of America, Appellee,

v.

Jerry E. WELLS, Appellant, United States of America, Appellee,

v.

Kenneth R. Steele, Appellant, United States of America, Appellant/Cross-Appellee,

v.

Jerry E. Wells, Appellee/Cross-Appellant, United States of America, Appellee/Cross-Appellant,

v.

Kenneth R. Steele, Appellant/Cross-Appellee.

Nos. 93-3924WM, 93-3932WM, 94-1031WM

United States Court of Appeals,
Eighth Circuit.

Submitted: June 13, 1994
Filed: Aug. 21, 1995

Appeals from the United States District Court for the Western District of Missouri.

Appendix A

Before MORRIS S. ARNOLD, Circuit Judge, JOHN R. GIBSON, Senior Circuit Judge, and MELLOY*, Chief District Judge.

MELLOY, Chief District Judge

Appellants, Jerry E. Wells and Kenneth R. Steele, were tried on one count of conspiracy to make material false statements and three counts of making material false statements to federally insured financial institutions, in violation of 18 U.S.C. §§ 371 and 1014. The court granted judgment of acquittal as to two counts of making material false statements. The appellants were ultimately convicted of the one count of conspiracy and one count of making a material false statement. The defendants appeal their conviction on Counts I (conspiracy) and II (making false statements). The United States of America cross-appeals, alleging errors by the court at sentencing. We vacate the defendants' convictions and remand to the district court for re-trial.

I. Background

The charges against the appellants relate to the appellants' roles in obtaining financing for their jointly owned business, Copytech Systems, Inc. Copytech, previously known as Doss Office Systems, Inc., was in the business of leasing and servicing copier equipment. At all times relevant to the charged crimes, Copytech was owned by three business associates, the defendants Wells and Steele, and convicted co-conspirator, Mr. Jim Russell.[1]

* The Honorable Michael J. Melloy, Chief United States District Judge for the Northern District of Iowa, sitting by designation.

1. Before the appellants' trial, Mr. Russell pled guilty, pursuant to a plea agreement, to one count of conspiring with the appellants, and to three counts of making false statements.

Appendix A

Defendant Wells was an attorney who provided legal services to Doss Office Systems, Inc. before Wells, Steele and Russell purchased it in May 1986. In 1986, the prior owner of the business approached Wells and Steele[2] with an offer to sell the company. Wells and Steele then invited Russell to purchase a share of Doss Office Systems. In May 1986, Wells and Steele's holding company, W & S Holding Company, Inc. (formed specifically for the purpose of purchasing Doss), purchased a two-thirds share of Doss, and Russell purchased the remaining one- third share. The company's name changed from Doss Office Systems to Copytech in 1987.

When Wells, Steele and Russell purchased Copytech, they inherited a company beset by financial trouble. They assumed, in addition to a serious cash flow problem, responsibility for over $8 million in debt. To remedy the cash shortage, Copytech obtained financing through the assignment of future lease payments from its customers' copier leases. Copytech would sell its rights to receive the future lease payments to a financial institution for cash. The leases were sold for a lump sum payment equal to the present value of the sixty-month lease income streams, discounted to yield the bank a 13%-15% profit.

Count I charged the defendants with conspiring to make material false statements to the banks providing such financing, and Count II alleged one instance of making material false statements to one of the banks. Specifically, the charges relate to sales of Copytech's interest in a particular form of lease/service agreement known as Copier Management Program (CMP) leases.

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2. Defendant Steele had participated in previous business ventures with Mr. Wells.

Appendix A

Under the CMP program, Copytech leased copier equipment and provided service and supplies for the leased equipment for one monthly lease/service fee. The CMP monthly lease payments were structured to cover both the fixed cost of providing the copiers and the variable cost of servicing the copiers ("soft costs"). The sale agreements under which Copytech sold its interest in the CMP leases provided for the assignment of Copytech's interest in the leases' income streams to the participating banks, but not the assignment of Copytech's obligations under the CMP leases. Copytech retained the obligation to pay the "soft costs" as the costs were incurred.

When the three Copytech owners purchased Copytech, the company had two established sources of funding: Boatmen's Bank of Kansas City and First State Bank of Joplin. Boatmen's Bank required Copytech to maintain a cash reserve account, equal to 15% of the value of the lease contracts, to cover the "soft" service costs in the event of a customer's default on monthly payments, or in case Copytech went out of business. In the face of overdrafts at First State Bank, however, Copytech moved its portfolio from Boatmen's to First State. By moving its money, it freed the reserve account and was able to apply the $500,000 reserve balance to cover its First State overdrafts.

In late 1986 or early 1987, Norwest Bank offered to purchase CMP contracts from Copytech. Because Norwest was aware of the dual lease/service nature of the CMP contracts and Copytech's service obligation under the contracts, it required Copytech to maintain a cash reserve account similar to the account that Boatmen's Bank had required. Copytech turned down Norwest's offer because it needed more money up front and did not want to tie up cash in a reserve account.

The conspiracy charges allege that the conspiracy began

after the Norwest experience. After turning down Norwest's offer to purchase CMP contracts, Copytech's owners agreed to misrepresent their service obligations in order to avoid the requirement of maintaining a reserve account. To that end, Copytech altered the language in the CMP lease contracts. The original CMP contract language stated that the lessor (Copytech) was solely responsible for installation and maintenance of the equipment. The revised CMP contract contained the following language:

> Lessee (customer) will keep the leased equipment in good repair and first- class mechanical condition without cost or liability to the lessor ([Copytech]). . . .
>
> This lease constitutes the entire agreement of the parties with respect to the subject matter thereof; may not be changed or modified except in writing . . . . This lease may only be modified, extended or renewed by a writing signed by the parties hereto.

Although this language expressly states that Copytech does not have any responsibility to service the copiers, revised CMP contracts were executed in conjunction with CMP service addenda shifting the responsibility for servicing the leased copy equipment back onto Copytech. Copytech would then send the CMP leases to its funding sources without including the CMP addenda. By withholding the service addenda from the financial institutions, Copytech was able to hide the service and maintenance obligation and obtain funding without being required to maintain cash reserves to cover service costs.

At the close of evidence, the court entered judgment of acquittal as to Counts III and IV, each alleging the making of a false statement to Bank IV. The only Counts submitted to the jury were Count I, conspiracy to make false statements, and Count II, making a false statement to O'Bannon Bank.

Count I alleged a conspiracy to make material false statements, in violation of 18 U.S.C. § 1014, by omitting any reference to the hidden service costs of CMP contracts. The defendants argue that the omission of information cannot constitute a false statement, that the information on the contract was not technically "false" because the information supplied was literally true, and that in any case, the omission was not material to the transaction. Count II alleged that the defendants made material false statements to O'Bannon Bank by submitting unconditional personal guaranties bearing the signatures of the defendants' wives, knowing full well that they had forged the signatures of their wives. The defendants admit that they had signed their wives' signatures, but maintain that the signatures do not constitute "false" statements because they had the authority, or at least a good faith belief that they had the authority, to sign their spouses' names to the loan guarantees. They also argue that their spouses' loan guarantees were not material to the transactions.

II. Trial Errors

The appellants raise several issues on appeal. They claim that the evidence produced at trial was insufficient to prove guilt beyond a reasonable doubt on each element of both Counts I and II, that Count I failed to allege a violation of 18 U.S.C. § 1014, and that the court erred in excluding certain expert evidence introduced by the defense and in failing to give a multiple

conspiracy instruction as to Count I. In addition, the appellants argue that the court erred in determining the "materiality" of the charged material false statements as a matter of law rather than submitting the issue to the jury.[3] Based on these claimed errors, the appellants request entry of judgment of acquittal or reversal of the convictions and remand for new trial.

A. Judicial Determination of Materiality

The defendants were convicted of conspiring to make false statements and making false statements for the purpose of influencing a federally insured banking institution, in violation of 18 U.S.C. §§ 371 and 1014. The trial court required the government to prove the materiality of the false statements charged under both counts I and II as an element of proving both §§ 371 and 1014. The materiality issue was hotly disputed; however, the trial judge determined that the statements were material as a matter of law and instructed the jury that they were not to deliberate on the issue of materiality. The appellants argue that removing the question of materiality from the jury violated

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3. The appellants raised the issue of failure to submit materiality to the jury during trial and preserved error on this issue. Appellants also raised the issue in their motion for a new trial. We address this issue despite the fact that it was not raised directly in the appellants' brief on appeal. Under past Eighth Circuit law, the element of materiality in a prosecution for violation of a statute like 1014 was clearly a question for the judge. During the pendency of this appeal, however, the issue has been revived in light of the Supreme Court's recent opinion in *Gaudin v. United States*, ___ U.S. ___, 115 S.Ct. 2310 (1995). Because the defendants did not waive this issue and the appellees acknowledge that the issue was raised, at least peripherally on appeal, we address the issue here. We did request and receive supplemental briefs after the *Gaudin* decision on this issue.

their constitutional right to have a jury decide each element of the charged crimes.[4]

The Fifth Amendment right to due process of the law and the Sixth Amendment right to a jury trial, together, mandate that a jury must determine every element of the crime with which a defendant is charged. *United States v. Gaudin*, ___ U.S. ___, 115 S.Ct. 2310 (1995). Where a criminal statute requires proof of the "materiality" of a false statement as an element of a crime, a defendant's right to a jury trial is violated when the court removes consideration of that element from the jury and determines materiality as a matter of law. *Id.* at 2320.

In *Gaudin*, the defendant had been convicted of violating the false statement portion of 18 U.S.C. § 1001, which like § 1014, does not explicitly list materiality as an element of the crime. Id. at 2313. At trial, the district court instructed the jury that the charged false statements were material as a matter of law. On appeal, the Ninth Circuit Court of Appeals reversed the conviction based on Ninth Circuit precedents dictating that materiality be determined by a jury. The Supreme Court granted certiorari to resolve a split among the circuits on the question of whether the "materiality" of false statements is a matter for the judge to decide or an element of the crime to be submitted to a jury. The Supreme Court held that, "[t]he Constitution gives a criminal defendant the right to have a jury determine, beyond a reasonable doubt, his guilt of every element of the crime with which he is charged." *Id.* at 2320. Because it was uncontested that

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4. The trial judge was of the opinion that the issue of materiality should be submitted to the jury. He stated: ". . . I really think it's a jury issue as to whether the representations were material or not material." Tr. 1737. He went on to state, however, that controlling Eighth Circuit law required him to decide the issue as a matter of law.

a conviction under the false statement prong of § 1001 required proof that the statements be "material", the court affirmed the Ninth Circuit decision reversing the conviction on the basis of the trial court's improperly removing consideration of materiality from the jury. *Id.*

In the instant case, the appellants argue that "materiality" is an essential element of proving a violation of 18 U.S.C. § 1014 and that judicial determination of materiality at trial violated their constitutional right to trial by jury. The government counters that since 18 U.S.C. § 1014 does not explicitly include the term materiality in its definition of the crime,[5] materiality is not an element of the crime in the sense that judicial determination of materiality would violate a defendant's constitutional right to have a jury decide each element of a charged crime. Since all of the parties acknowledge that the court removed the question of materiality from the jury, we must resolve the issue of whether materiality is an element of proving a charge of making a false statement in violation of 18 U.S.C. § 1014.

With respect to similar fraud statutes, which like § 1014 do not explicitly list materiality in the definition of the crime, this court has held that materiality is an element of proof. *See United States v. Adler*, 623 F.2d 1287 (8th Cir.1980). In *Adler*, the defendant had been convicted on fourteen counts of willfully and

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5. 18 U.S.C. § 1014 states that: "[w]hoever knowingly makes any false statement or report, or willfully overvalues any land, property or security, for the purpose of influencing in any way the action of . . . any institution the accounts of which are insured by the Federal Deposit Insurance Corporation, . . . upon any application, advance, discount, purchase, purchase agreement, repurchase agreement, commitment, or loan, or any change or extension of any of the same . . . shall be fined not more than $1,000,000 or imprisoned not more than 30 years, or both."

knowingly making false statements on claims submitted under the Medicaid and Medicare programs in violation of 18 U.S.C. § 1001 and four counts of willfully and knowingly making false claims under the same programs in violation of 18 U.S.C. § 287. Although neither statute lists materiality as an element of the crime,[6] this court held that materiality is an essential element of both statutes. *Adler*, 623 F.2d at 1291 n.5.

With respect to the § 1001 charge in *Adler*, this court stated, "[a]lthough 28[sic] U.S.C. § 1001 on its face does not limit its coverage to those false statements which are material, it has been well established that materiality of the statement is an element of a violation of 18 U.S.C. § 1001. *United States v. Voorhees*, 593 F.2d 346 (8th Cir.), *cert. denied*, 441 U.S. 936, 99 S.Ct. 2061 (1979)." *Id.* at 1291. In regard to the § 287 charge, the court found that "[n]either appellant nor the government distinguishes between 18 U.S.C. § 1001 and 18 U.S.C. § 287 as far as the requirement of a showing that the false claim or false statement involved is material. Accordingly, we treat materiality as an essential element of both statutes. We see no reason to treat the statutes differently." *Id.* n.5.

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6. 18 U.S.C. §1001 provides: "Whoever, in any matter within the jurisdiction of any department or agency of the United States knowingly and willfully falsifies, conceals or covers up by any trick, scheme, or device a material fact, or makes any false, fictitious or fraudulent statements or representations, or makes or uses any false writing or document knowing the same to contain any false, fictitious or fraudulent statement or entry, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

18 U.S.C. § 287 provides: "Whoever makes or presents to any person or officer in the civil, military, or naval service of the United States, or to any department or agency thereof, any claim upon or against the United States, or any department or agency thereof, knowing such claim to be false, fictitious, or fraudulent, shall be fined not more than $10,000 or imprisoned not more than five years, or both."

Like 18 U.S.C. § 1001, the statute at issue in *Adler*, the statute at issue in this case, 18 U.S.C. § 1014, on its face does not limit its coverage to those false statements which are material. However, it has been well established that materiality of the statement is an element of a violation of 18 U.S.C. § 1014. *See United States v. Concemi*, 957 F.2d 942, 951 (1st Cir.); *United States v. Ryan*, 828 F.2d 1010, 1014 n.1 (3d Cir.); *United States v. Bonnette*, 663 F.2d 495, 496 (4th Cir.); *United States v. Thompson*, 811 F.2d 841, 843 (5th Cir.); *United States v. Spears*, 49 F.3d 1136 (6th Cir.1995); *Theron v. United States Marshal*, 832 F.2d 492, 496 (9th Cir.1987); *United States v. Smith*, 838 F.2d 436, 439 (10th Cir.1988); *United States v. Rapp*, 871 F.2d 957, 964 (11th Cir.1989). We see no reason to treat § 1014 any differently from the similarly worded ss 287 and 1001. Therefore, we explicitly adopt the rule we have implicitly acknowledged before, that the "materiality" of a false statement is an element of proving a violation of § 1014. *See United States v. Ribaste*, 905 F.2d 1140 (8th Cir.1990); *see also United States v. Garfinkle*, 29 F.3d 1253, 1256 (8th Cir.1994); *United States v. McKnight*, 771 F.2d 388 (8th Cir.1985); *United States v. Habib*, 594 F.2d 1215, 1216 (8th Cir.1979) (defendants charged with making statements that were materially false under § 1014), and *see also, United States v. Mallen*, 843 F.2d 1096, 1102 (8th Cir.1987); *United States v. Reeves*, 674 F.2d 739, 747 (8th Cir.1982); *United States v. Segal*, 649 F.2d 599 (8th Cir.1981) (indictments in § 1014 prosecutions alleged material false statements).

While conceding that most courts require proof of materiality to support a conviction under § 1014, the government argues that courts impose the requirement of proving materiality to exclude trifles from its coverage not as a statutorily required element of the crime. *See United States v. Corsino*, 812 F.2d 26, 30 (1st Cir.1987); *see also Hughes v. United States*, 899 F.2d 1495

(6th Cir.1990); *United States v. Keefer*, 799 F.2d 1115 (6th Cir.1986); *United States v. Abadi*, 706 F.2d 178 (6th Cir.1983); *United States v. Beer*, 518 F.2d 168, 170 (5th Cir.1975). In *Beer*, for example, the court stated that:

> "[w]hen dealing with a pervasive, all-encompassing statute, however, the courts must be extremely careful to insure that reasonable limits are observed. This is merely a restatement of the canon of construction that criminal statutes are to be strictly construed. [citations omitted] In order to exclude 'trivial' falsehoods from the purview of the statute, the courts have read a requirement of materiality into its second clause. . . ."

Beer, 518 F.2d at 171. The fact that courts resort to canons of statutory construction to determine that statutes like § 1014 require proof of materiality, however, does not alter our conclusion that proof of materiality is a statutorily required element of the crime.

The primary objective of statutory construction is to determine legislative intent. *United States v. Jones*, 811 F.2d 444, 447 (8th Cir.1987). While it is the function of the legislature to make the laws, it is the function of the courts to finally and authoritatively interpret what the law says. Sutherland Stat. Const. § 45.03(5th Ed). In this case, we construe § 1014 to require proof of the materiality of a false statement. Because the statute requires proof of the materiality of a false statement, materiality is an element of § 1014. *Gaudin*, therefore, dictates that we vacate the defendants' convictions on both counts I and II and remand

the case to the district court for retrial. The trial court's determination of materiality as a matter of law denied the defendants' constitutional right to have a jury determine each and every element of a charged crime, including the materiality of a false statement charged under § 1014 and under the § 371 charge of a conspiracy to violate § 1014.

B. Violation of 18 U.S.C. § 1014-Count I

The appellants argue that Count I does not allege a violation of 18 U.S.C. § 1014 and that the court erred in not granting their motions for judgment of acquittal, arrest of judgment, and new trial. Since we are remanding for a new trial because of *Gaudin*, we need only address the judgment of acquittal and arrest of judgment issues. Count I alleges a conspiracy to make false statements to financial institutions by agreement to avoid telling the banks about Copytech's financial responsibility to service the copiers under the CMP contracts. The appellants claim that withholding information cannot support a conviction under § 1014, only affirmative assertions of facts can. We disagree. Other courts have broadly interpreted § 1014 to cover various types of acts and misrepresentations as statements. *See, e.g., United States v. Haddock*, 956 F.2d 1534 (10th Cir.1992) (evidence that defendant failed to disclose line of credit sufficient to convict under § 1014); *United States v. Trexler*, 474 F.2d 369, 370- 71 (5th Cir.) (in a § 1014 prosecution, the jury could consider what "a defendant does or fails to do", it is not limited to affirmative acts); *United States v. Sackett*, 598 F.2d 739, 740-42 (2d Cir.1979) (in § 1014 prosecution, there was sufficient evidence for the jury to convict for omitting information orally on loan application); *United States v. Trice*, 823 F.2d 80 (5th Cir.1987) (failure to disclose material information needed to avoid deception in connection with loan transactions covered by

§ 1014 constitutes a false statement or report within the meaning of the statute and thus violates the statute); *Unites States v. Ryan*, 828 F.2d 1010, 1017 (3d Cir.1987) (fact that a word was not spoken or written does not necessarily mean that a message was not sent and received; under § 1014 a statement included assertive "nonverbal conduct"); *United States v. Concemi*, 957 F.2d 942, 959-61 (1st Cir.1992) (HUD-1 certificates which omit information about second mortgage constitute "statement" for § 1014 purposes).

Likewise, in construing a similar statute, we have recognized that an omission in a § 1005 prosecution can constitute a "false entry" where an honest entry would otherwise be made. *See United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir.1987). The defendant in *Copple* was prosecuted under 18 U.S.C. § 1005 for making false entries in a bank book, report or statement. The defendant argued that the evidence was not sufficient to support a § 1005 charge because there could not have been a false entry made where the false documents were withheld, rather than entered. We held, *citing United States v. Dougherty*, 736 F.2d 970, 973 (8th Cir.1985), that an omission could constitute a false entry, where an honest entry would otherwise be made. In this case, Count I charges that the appellants conspired to violate § 1014 by knowingly omitting material information for the purpose of influencing federally insured financial institutions. As in *Copple*, such omissions may constitute a false statement where honest statements would otherwise be made. The literal truth of information that is actually submitted does not shield the intentional omission of material information from prosecution under § 1014. The allegations contained in Count I of the indictment are sufficient to allege a violation of 18 U.S.C. § 1014.

Appendix A

C. Sufficiency of Evidence

The defendants argue that the evidence produced at trial, as to both Counts I and II, was legally insufficient to prove guilt beyond a reasonable doubt as to each and every element of both counts. As to Count I, the defendants claim that the evidence does not support a finding that they intended to influence the banks. As to Count II, they argue that the evidence does not support a finding that they did not have the authority to sign their wives signatures. As to both counts, they claim that the evidence does not support a finding that the false statements were "material". Consequently, they claim that the Court violated their Fifth Amendment right to due process by denying their motions for judgment of acquittal, arrest of judgment and new trial. Again, since we are remanding for a new trial on other grounds, we need only address whether the motion for judgment of acquittal or arrest of judgment should have been granted.

In reviewing the denial of a motion for judgment of acquittal, the evidence is viewed in the light most favorable to the government, resolving evidentiary conflicts in favor of the government, and accepting as established all reasonable inferences which may be logically drawn from the evidence. *United States v. Springer*, 831 F.2d 781, 783-84 (8th Cir.1987), *cert. denied*, 485 U.S. 938 (1988); *United States v. Rodriguez*, 812 F.2d 414, 416 (8th Cir.1987). A motion for judgment of acquittal should be granted only where the evidence is such that a reasonably minded jury must have a reasonable doubt as to the existence of one of the essential elements of the crime charged. The court can neither weigh the evidence nor assess the credibility of the witnesses. *Burks v. United States*, 437 U.S. 1, 16 (1978). Determining the credibility of witnesses is the jury's function.

Application of that standard to the record in this case leads us to the conclusion that there was more than sufficient evidence to support each defendant's conviction on each element of both Counts I and II. Mr. Russell, the third co-defendant in this case testified against both Wells and Steele on each count. Since his testimony is not incredible or insubstantial on its face, it is sufficient to sustain a conviction on both counts. *See United States v. Drews*, 877 F.2d 10, 13 (8th Cir.1989) (The uncorroborated testimony of an accomplice is sufficient to sustain a conviction if the testimony is not incredible or insubstantial on its face.). In addition, the evidence of the timing of the evolution of the CMP contract language supports an inference of intent as to Count I. Evidence that the defendants did not sign their own wives' names to the loan guarantees supports both an inference that they did not have the authority to sign their wives names as they claim and that they intended to submit false signatures and influence the bank.

The defendants argue that neither the withholding of the information alleged in Count I nor their wives' signatures on personal loan guarantees were material because there was some evidence that bank officers would not have relied on the information. Reliance, however, is not necessary to make out a violation of § 1014. *United States v. Copple*, 827 F.2d 1182, 1187 (8th Cir.1987). The crime is one of subjective intent, it is enough that the statement has the capacity of influencing the financial institution. *United States v. Glassey*, 715 F.2d 352 (7th Cir.1983); *United States v. Bonnette*, 663 F.2d 495 (4th Cir.1981). In this case, the evidence that Boatmen's and Norwest required reserve accounts as a precondition to financing the CMP leases is sufficient to support a finding that the withheld information was material, or in other words, had the capacity to influence the financial institutions. The fact that O'Bannon Bank asked the

defendants to have their wives sign unconditional loan guarantees supports a reasonable inference that personal loan guarantees from the defendants' spouses would have the capacity of influencing the bank.

D. Expert Testimony

The defendants also challenge the court's exclusion of expert testimony on the issues of whether the revised copier lease contracts and their coordinate CMP addenda were, together, part of the same lease and whether the false statements were material. As the expert's proffered testimony amounted to instructing the jury on the law, the court's exclusion of the evidence was not manifestly erroneous. *See, e.g., Specht v. Jensen*, 853 F.2d 805, 807 (10th Cir.1988), *cert. denied*, 488 U.S. 1008 (1989); *United States v. DiDomenico*, 985 F.2d 1159, 1164 (2d Cir.1993) (instruction on the law is the function of the court, not a defense expert). We do not reach the question of whether the court's refusal to admit expert evidence on the issue of materiality was erroneous because we are remanding the case for retrial on other grounds. However, we note that the admissibility of expert evidence on the issue of the materiality of false statements should be determined in light of our holding above that materiality is an issue for the jury.

III. Multiple Conspiracy and Sentencing Errors

Appellants appeal the trial court's decision to not give a multiple conspiracy instruction. Because we reverse the defendants' convictions and remand for new trial, we do not reach the issue of whether the evidence at a new trial will require a multiple conspiracy instruction. Likewise, we do not decide the sentencing issues raised by the government in its cross-appeal.

IV. Conclusion

We hold that proof of the materiality of an alleged false statement is required as an element of proving a violation of 18 U.S.C. § 1014. The trial court in this case denied the appellants' constitutional right to have a jury deliberate on each and every element of proof of the charged crimes by instructing the jury that they were not to deliberate on the materiality of the false statements underlying both Counts I and II because the statements were material as a matter of law. Since the evidence was otherwise sufficient to support a conviction and overcome the defendants' motions for judgment of acquittal, we vacate the convictions and remand to the district court for retrial consistent with this order.

(3)

FILED

No. 95-167

In the Supreme Court of the United States

OCTOBER TERM, 1995

THOMAS S. WALDRON, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

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QUESTION PRESENTED

Whether, in petitioner's prosecution under 18 U.S.C. 1014 for making false representations to a bank, the absence of an instruction requiring the jury to determine that those false representations were material was plain error.

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BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. 1a-7a) is reported at 53 F.3d 680.

JURISDICTION

The judgment of the court of appeals was entered on May 18, 1995. The petition for a writ of certiorari was filed on July 26, 1995. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the Middle District of Louisiana, petitioner was convicted on six counts of making false state-

ments for the purpose of influencing the lending actions of a federally insured bank, in violation of 18 U.S.C. 1014. He was sentenced to a term of 36 months' imprisonment, to be followed by five years' probation. He was also fined a total of $2 million. The court of appeals affirmed. Pet. App. 1a-7a.

1. In 1981, petitioner, a real estate developer, purchased a parcel of Florida real estate for $1,850,000 through his corporation, Marpalm Ranch and Farm, Inc. (Marpalm). Petitioner later began to experience financial problems, and invited two associates, Larry Reger and Harry Williams, to buy into the development venture and assume the mortgage payments on the property. In 1982, petitioner, in exchange for certain payments, entered into a contract to sell the property to Reger and Williams, with an arrangement for a closing in escrow. Petitioner also executed two unrecorded warranty deeds for the property which were held by a trustee for Reger and Williams. The 1982 contract disclosed four pending disputes over environmental issues affecting the property. Pet. App. 1a-2a.

In 1985, petitioner, through three nominee corporations, obtained three loans on the Marpalm property from the Sun Belt Federal Bank (Sun Belt) in the amount of $1 million each. Petitioner did not disclose to the nominee corporations or to Sun Belt the existence of the 1982 contract for the sale of the property, the two warranty deeds, or the pending environmental proceedings. As a result, each nominee, at petitioner's direction, incorrectly represented to Sun Belt in loan agreements and affidavits that no litigation or governmental proceeding was pending or threatened against the land, and that the land was not subject to any encumbrance other than the mortgage

to Sun Belt. After the trustee for Reger and Williams learned of the Sun Belt loans to petitioner on the Marpalm property, he filed one of the previously unrecorded warranty deeds. Pet. App. 2a-4a.

2. Following a jury trial, petitioner was convicted on six counts of making false statements for the purpose of influencing the lending actions of Sun Belt, in violation of 18 U.S.C. 1014. Those counts arose from petitioner's failure to disclose the 1982 contract for sale, the warranty deeds, and the environmental proceedings affecting the property. In its instructions, the district court advised the jury that the materiality of the alleged false representations was a question of law for the court, and that the court had determined that the statements at issue in the Section 1014 counts were material. 10/25/93 Tr. 263. Petitioner agreed that materiality was a determination for the court, and had requested that the district court not only not submit the issue of materiality to the jury, but that the jury not be told that the court had found petitioner's representations material.[1]

3. The court of appeals affirmed. Pet. App. 1a-7a. It rejected petitioner's challenges to the sufficiency of the evidence and to several evidentiary rulings, *id.* at 1a-7a, and summarily rejected petitioner's additional claim (see Pet. C.A. Br. 42-46) that the district

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[1] Petitioner's trial counsel stated:

> We object to the fourth element of materiality delivered by the court in connection with the Section 1014 instruction. Materiality is not a word used in the indictment. It being a matter for the court, under Fifth Circuit law, we think it, the jury, should not properly be instructed on the matter at all.

10/25/93 Tr. 272.

court committed plain error in not requiring the jury to determine the materiality of the false statements. See Pet. App. 7a (stating without elaboration that "review of [petitioner's] remaining issues on appeal reveals no reversible error on the part of the district court").

ARGUMENT

Petitioner argues that materiality is an element of the offense described by 18 U.S.C. 1014 and that his conviction must be reversed because the district court did not instruct the jury that it must find that the false statements were material in order to convict. That contention lacks merit, both because materiality is not an element of Section 1014 and because, even if it were, any defect in the instructions in this case would not constitute plain error.

1. In *United States* v. *Gaudin*, 115 S. Ct. 2310 (1995), this Court held that, where the materiality of a false statement is an element of an offense, the statement's materiality is to be determined by the jury, not by the court.[2] Materiality of the alleged false statement, however, is not an element of Section 1014. Section 1014 authorizes the conviction of whoever "knowingly makes any false statement," where that statement is made "for the purpose of influencing in any way the action" of covered financial institutions (including the federally insured bank involved here) on loans or other specified transactions. The lan-

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[2] To be material, a statement must have "a natural tendency to influence, or [be] capable of influencing, the decision of the decisionmaking body to which it was addressed." *Gaudin*, 115 S. Ct. at 2313.

guage of Section 1014 does not require that the false statement also be material.

Because Congress defines the elements of an offense through the language of the statute, Section 1014 does not support the conclusion that materiality is an element of that offense. See *Staples* v. *United States*, 114 S. Ct. 1793, 1796 (1994) ("The definition of the elements of a criminal offense is entrusted to the legislature, particularly in the case of federal crimes, which are solely creatures of statute.") (quoting *Liparota* v. *United States*, 471 U.S. 419, 424 (1985)); *McMillan* v. *Pennsylvania*, 477 U.S. 79, 85 (1986) ("[I]n determining what facts must be proved beyond a reasonable doubt the [legislature's] definition of the elements of the offense is usually dispositive."). Accordingly, as long as the false statement was made knowingly and for the purpose of influencing the bank's action on a loan, it is covered by the statutory proscription. *United States* v. *Cleary*, 565 F.2d 43, 46 (2d Cir. 1977) (materiality is not an element of Section 1014), cert. denied, 435 U.S. 915 (1978); see *United States* v. *Hoag*, 823 F.2d 1123, 1125-1126 (7th Cir. 1987) (materiality is not a requirement for conviction under a similarly worded statute, 18 U.S.C. 1010).

This Court reached a similar conclusion in *Kay* v. *United States*, 303 U.S. 1, 5-6 (1938), in construing a statute that was a direct predecessor of Section 1014 and that contained identical pertinent language.[3] The

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[3] *Kay* involved a prosecution under former 12 U.S.C. 1467(a) (repealed 1948), which provided for punishment of "[w]hoever makes any statement, knowing it to be false, * * * for the purpose of influencing in any way the action of the Home Owners' Loan Corporation * * * upon any * * * loan." See 303 U.S. at 3 n.1.

Court held that the alleged immateriality of a false statement made for the purpose of influencing the recipient was not a defense. The Court rejected the argument that the conviction could be reversed if the false statements in issue "cannot endanger or directly influence any loan," holding that

> [i]t does not lie with one knowingly making false statements with intent to mislead the officials of the Corporation to say that the statements were not influential or the information not important. There can be no question that Congress was entitled to require that the information be given in good faith and not falsely with intent to mislead.

303 U.S. at 5-6; see also *Williams* v. *United States*, 458 U.S. 279, 284 (1982) (listing elements of Section 1014; materiality not included).

It is true that most courts of appeals, including the court below, have listed materiality as an element of Section 1014—albeit an element that, before *Gaudin*, was generally held appropriate for judicial, not jury, resolution.[4] To the limited extent that those courts

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[4] See, *e.g.*, *United States* v. *Spears*, 49 F.3d 1136, 1141 (6th Cir. 1995); *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992); *United States* v. *Concemi*, 957 F.2d 942, 951 (1st Cir. 1992); *United States* v. *Haddock*, 956 F.2d 1534, 1549 (10th Cir.), cert. denied, 113 S. Ct. 88 (1992); *United States* v. *Rapp*, 871 F.2d 957, 964 (11th Cir.), cert. denied, 493 U.S. 890 (1989); *Theron* v. *United States Marshal*, 832 F.2d 492, 496 (9th Cir. 1987), cert. denied, 486 U.S. 1059 (1988); *United States* v. *Ryan*, 828 F.2d 1010, 1013 n.1 (3d Cir. 1987); *United States* v. *Thompson*, 811 F.2d 841, 844 (5th Cir. 1987); *United States* v. *Bonnette*, 663 F.2d 495, 497 (4th Cir. 1981), cert. denied, 455 U.S. 951 (1982). But see *United States* v. *Cleary*, 565 F.2d at 46.

have explained the addition of materiality to the elements identified in the text of Section 1014, they have stated that such a limitation serves to exclude from prosecution trivial false statements. See, *e.g.*, *United States* v. *Staniforth*, 971 F.2d 1355, 1358 (7th Cir. 1992). That objective is already met, however, by Section 1014's intent element. To establish the Section 1014 offense, prosecutors must establish, *inter alia*, that the defendant made the false representation for the purpose of influencing the actions of a financial institution. That requirement necessarily restricts the scope of cases prosecutable under Section 1014. And because juries will generally determine the defendant's purpose in making a false statement by considering the nature of that statement and the context in which it was made, convictions under Section 1014 are unlikely except when the jury is satisfied that the statement was material to the bank's decision. For that reason, the court of appeals for the Seventh Circuit has noted that, if materiality were not an element of the offense, the materiality issue would nonetheless "come in by the back door," because "the less material the statement was, the less likely it was to have been made for the purpose of influencing the bank, rather than out of sheer forgetfulness, carelessness, or confusion." *Stani-*

We note that, following this Court's decision in *Gaudin*, a panel of the Eighth Circuit, in *United States* v. *Wells*, Nos. 93-3924WM et al., 1995 WL 494268 (Aug. 21, 1995), and a panel of the Ninth Circuit, in *United States* v. *Nash*, Nos. 91-50760 et al., 1995 WL 500653 (Aug. 24, 1995), reversed convictions under Section 1014 where the issue of materiality had not been sent to the jury. The government has sought extensions of time within which to seek en banc review of those two decisions.

forth, 971 F.2d at 1357-1358. Similarly, the Ninth Circuit has observed:

> Th[e] conflict over [whether materiality is an element of Section 1014] will usually be only of academic interest. * * * An individual is not likely to provide immaterial and unimportant information in the hope of influencing a bank's action.

United States v. *Thurnhuber*, 572 F.2d 1307, 1309 n.1 (1977). Because there is thus no persuasive justification for grafting a materiality requirement onto the text of Section 1014, petitioner was not entitled to have the issue of materiality submitted to the jury.

2. While the conflict among the courts of appeals as to whether materiality is an element of Section 1014 might warrant review in a proper case, this case does not supply an appropriate vehicle to resolve that question. Because petitioner failed to object to (and indeed endorsed) the district court's decision not to send the issue of materiality to the jury, the sole question presented would be whether that decision was plain error in light of the particular facts of this case. See *United States* v. *Olano*, 113 S. Ct. 1770, 1775-1779 (1993) (appellate court may consider claims of error not raised below only if error is "clear" and "obvious" under current law, and will not reverse unless the error affected substantial rights and unless failure to reverse would result in a miscarriage of justice that "seriously affect[s] the fairness, integrity, or public reputation of judicial proceedings").

Petitioner fails to establish plain error. First, any error in the decision not to submit the issue of materiality to the jury in this case was not "clear" or

"obvious" under then-current law.[5] Nor was petitioner prejudiced by such error, both because the false representations he made to Sun Belt were patently material to its loan decisions, as the court of appeals found, see Pet. App. 5a-6a, and because, to convict, the jury necessarily concluded that petitioner made the false statements for the specific purpose of influencing the actions of Sun Belt on the loans. And, as we have discussed, it is difficult to imagine a jury finding such intent while at the same time regarding the false representations as incapable of influencing the bank's actions. Finally, even assuming clear error, petitioner's conviction did not amount to a "miscarriage of justice" warranting reversal, *Olano*, 113 S. Ct. at 1778-1779, given the jury's finding that petitioner sought to influence the lending decisions of Sun Belt through the false statements, and the findings by both the district court and the court of appeals that the statements were in fact material to those decisions.[6]

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[5] On the contrary, at the time of trial and even at the time of the court of appeals' decision (issued one month before this Court's decision in *Gaudin*), it was neither clear nor obvious that if materiality was an element of a false statement offense it should be decided by the jury. Rather, the weight of authority was that the materiality determination in false statement cases was a question for the court. See, *e.g.*, *United States* v. *Thompson*, 811 F.2d at 845 n.4.

[6] A panel of the Ninth Circuit, in *United States* v. *Nash*, *supra*, recently found it plain error to fail to submit a materiality question to the jury under Section 1014 in the circumstances of that case. As we have noted (note 4, *supra*), the government has sought an extension of time within which to file a petition for rehearing in *Nash*.

3. Finally, contrary to petitioner's assertion (Pet. 11-12), the decision below does not conflict with this Court's decision in *Gaudin*. *Gaudin* involved a prosecution under 18 U.S.C. 1001, and the government conceded that materiality was an element of that offense.[7] Moreover, this Court in *Gaudin* did not hold, even with respect to the Section 1001 offense at issue, that a failure to require the jury to determine materiality would necessarily constitute plain error requiring reversal. See 115 S. Ct. at 2322 (Rehnquist, C.J., concurring).

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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SEPTEMBER 1995

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[7] The issue whether materiality is an element of Section 1001 is distinct from the issue whether it is an element of Section 1014. Unlike Section 1014, one of the clauses of Section 1001 contains the term "material." Moreover, Section 1001 does not contain an intent element equivalent to the requirement of Section 1014 that the false representation be "for the purpose" of influencing the action of the decisionmaking body. See *United States* v. *Beer*, 518 F.2d 168, 171 (5th Cir. 1975) (requiring a showing of materiality under Section 1001, but distinguishing statutes that require proof that a false statement was " 'intended' to deceive").

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In The

Supreme Court of the United States

October Term, 1995

THOMAS S. WALDRON,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Fifth Circuit

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ARGUMENT

I.

THE GOVERNMENT'S PROPOSED CONSTRUCTION OF 18 U.S.C. § 1014 CONFLICTS WITH CIRCUIT PRECEDENT, AND INDEPENDENTLY REQUIRES A GRANT OF CERTIORARI TO RESOLVE AN IMPORTANT QUESTION OF FEDERAL CRIMINAL LAW

The Government acknowledges that in every circuit court of appeals save one, a defendant is entitled to a jury instruction that materiality is an element of the Government's proof in a § 1014 prosecution.[1] *See* Petitioner's Supplemental Brief and cases cited therein; *see also* Brief in Opp. 6, n. 4. Thus, after *United States v. Gaudin*, 115 S. Ct. 2310 (1995), the element of materiality in such cases will be submitted to the jury, not decided by the court. Nevertheless, the Government disregards those circuit precedents, and contends that although materiality was not submitted to Waldron's jury, he is not entitled to review of his conviction because "materiality is not an element of Section 1014." Brief in Opp. 4.

This Court should grant certiorari, because if the Government is correct, ten circuits are wrong. If the Government is wrong, it should not be advocating an erroneous position to sustain Waldron's conviction. If the essential elements of a federal crime can vary from circuit to circuit, or if the Government persists in advocating a position contrary to

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1. The single contrary decision is *United States v. Cleary*, 565 F.2d 43, 46 (2d Cir. 1977). The Government's offer of *Kay v. United States*, 303 U.S. 1 (1938), does not undermine the majority circuit construction of 18 U.S.C. § 1014. *Kay* made clear that "actual damage is not an ingredient of the [12 U.S.C. § 1467] offense." *Id.* at 4. It did not determine the essential elements of a crime not then created by Congress — 18 U.S.C. § 1014.

established circuit precedents, this Court should resolve the question.

The Government acknowledges that following *Gaudin*, the Eighth and Ninth Circuits recently "reversed convictions under Section 1014 where the issue of materiality had not been sent to the jury." Brief in Opp. 7, n. 4 The Government is going to seek *en banc* review of those decisions. *Id.* Plenary review of this case would obviate the necessity of numerous courts of appeals' trying to reconcile the Government's Section 1014 construct with prior circuit precedents, and with *Gaudin*. At the least, a grant of certiorari and a remand to the Fifth Circuit would provide Waldron with an equal appellate opportunity to have judicial review of his conviction in light of *Gaudin*. *Compare, Kapoor v. United States*, 54 F.3d 765 (table), *cert. granted*, __ U.S. __, 1995 WL 334929 (No. 94-1926) (Oct. 2, 1995) (vacating perjury judgment, remanding to Second Circuit for reconsideration in light of *Gaudin*).If the Fifth Circuit's decision is allowed to stand, this conviction will be out of synch with others presenting similar issues, and this Court's promise in *Griffith v. Kentucky*, 479 U.S. 314, 328 (1987) ("We therefore hold that a new rule for the conduct of criminal prosecutions is to be applied retroactively to all cases, state or federal, pending on direct review, or not yet final, with no exception. . . ."), will be unfulfilled.

II.

THE QUESTION LEFT OPEN IN *GAUDIN* AND RAISED HERE BY THE GOVERNMENT — WHETHER PLAIN ERROR ANALYSIS APPLIES — WARRANTS A GRANT OF CERTIORARI

The Government's opposition to review in this case admits that "the conflict among the courts of appeals as to whether

materiality is an element of Section 1014 might warrant review in a proper case. . ." (Brief in Opp. 8), but claims that Waldron's failure to object at trial makes this only a "plain error case."[2]

That argument collides with post-*Gaudin* decisions of the lower courts, and anticipates the plain error and harmless error questions left open in *Gaudin* (115 S.Ct. at 2321-22, Rehnquist, C.J., O'Connor, and Breyer, JJ., concurring), thus presenting additional reasons for this Court to grant review. Subsequent to Petitioner's Supplemental Brief, another post-*Gaudin* court has found that the failure to submit the essential element of materiality to a jury requires a new trial, without resort to plain error analysis. *United States v. Pearson*, __ F.Supp. __, 1995 WL 541716 (C.D. Ill. 1995) (18 U.S.C. § 1623 perjury conviction). The Ninth Circuit has found plain error analysis applicable, but satisfied, in a *Gaudin* error situation. *United States v. Nash*, __ F.3d __, 1995 WL 500653 (9th Cir. 1995).

In *Pearson*, the court concluded that a pre-*Gaudin* objection to the "materiality is a matter of law" instruction would have been "a waste of time" given circuit precedent, and that despite the failure to object, the instruction given required reversal, not a plain error analysis:

> In short, the plain error doctrine is not applicable in the instant case. Why? Because there was no error at trial. As all parties have conceded, at the time of the trial, the law in the Seventh Circuit was "well settled;" materiality was a question of law for the court to decide. *Watson*, 623 F.2d at 1201. As noted

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2. The Government does not dispute that Waldron's appeal anticipated the *Gaudin* rule. As set forth in the petition for certiorari, during the pendency of *Gaudin*, Waldron raised it in his Fifth Circuit brief, at oral argument, post argument, and in a motion for bond pending certiorari review.

by the Supreme Court, a court cannot review for plain error unless there is first an error. *Gaudin*, at *40 (citing, *United States v. Olano*, 113 S.Ct. 1770 (1993)). Thus, since there was no error at trial, the plain error doctrine is obviously not applicable.

Indeed, the issue before the Court is much simpler. As a result of the retroactive application of *Gaudin*, Scott is entitled to a new trial. It is that simple.

* * *

Perhaps we can make this issue even more clear. A prerequisite to the application of the plain error doctrine is a failure to object at trial. *United States v. Lakich*, 23 F.3d 1203, 1207 (7th Cir. 1994). Here, the law was clear in the Seventh Circuit, i.e., materiality was a question of law for the court. So how can Scott be faulted for not objecting to the materiality issue at trial? What could he have possibly objected to? Since the law was clear in this circuit prior to *Gaudin*, Scott's sole argument in support of such an objection would have been to ask the district court to overrule the "well settled" law in the Seventh Circuit. Obviously, an argument of this nature would have been a waste of everyone's time.

The Ninth Circuit in *Nash* reached the same result — a new trial — through a different route. First, the court reaffirmed that materiality is an essential element of 18 U.S.C. § 1014. 1995 WL 500653 at *2. Then, noting that an earlier panel had found the

error in *Gaudin* to be "structural and plain," *id.* at *3, the Ninth Circuit found that a *Gaudin* "materiality" error in a § 1014 prosecution satisfied the plain error standard, and reversed the § 1014 convictions.[3]

If *Pearson* is right, or if *Nash* is right, or if plain error does not apply to a *Gaudin* case in which the jury has been precluded from deciding an essential element of a crime, then Waldron's conviction cannot be sustained. The Government seeks to avoid that result by suggesting that Waldron's counsel "agreed that materiality was a determination for the court." Brief in Opp. 3. But the words of trial counsel, quoted by both Petitioner and the Government (Pet. Cert. 7, n. 1; Brief in Opp. 3, n. 1), evidence his recognition of the governing precedent, and his attempt to avoid the prejudice of having a jury told that the judge had decided an essential element against Waldron. That was not acquiescence, but an attempt to avoid the effects of the pre-*Gaudin* state of the law.

The Government's speculation about how the jury could have perceived Waldron's alleged false statements (Brief in Opp. 8-9) is a premature "harmless error" analysis. Whether harmless error applies at all is an important question left unanswered in *Gaudin*. 115 S.Ct. at 2321-22 (Rehnquist, C.J., and O'Connor and Breyer, JJ., concurring). If harmless error does not apply, the Government's view of the jury's thought processes is irrelevant. If harmless error applies, review of the whole record is required, including Waldron's evidence that the *de minimis* environmental dispute, and deeds which had no legal import, were not material. Pet. Cert. 4-5. A court, not the Government, should decide

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3. *But see United States v. Keys*, __ F.3d __, 1995 WL 574226 (9th Cir. Sept. 29, 1995) (analyzing claim of *Gaudin* error in a § 1623 perjury case, finding it to be plain error under *Olano*, but exercising discretion not to reverse, because, *inter alia*, the error was "invited" and the case "did not present a 'serious factual question' regarding the omitted element").

whether Waldron's conviction was a "miscarriage of justice." Brief in Opp. 9.

Whether *Gaudin* merits reversal of Waldron's convictions is properly before this Court for plenary review, or for remand to the Fifth Circuit to consider the effect of the June 19, 1995 *Gaudin* decision on Waldron's May 18, 1995 conviction affirmance.

CONCLUSION

Certiorari should be granted. Either plenary review, or a remand in light of *Gaudin*, should be accorded.

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